IN THE HIGH COURT OF JUDICATURE
ANDHRA PRADESH
AT HYDERABAD

THE HON'BLE MR JUSTICE J.CHELAMESWAR
and
THE HON'BLE MR JUSTICE D.APPA RAO

WRIT PETITION NO : 2672 of 2003

Dated: 27th July 2006

Between:
B.M.Malani .. Petitioner

AND

The Commissioner of Income Tax,
Andhra Pradesh-V, Buddha Bhavan,
Mahatma Gandhi Road,
Secunderabad and another ..
Respondents

ORDER : (per JC,J)

The writ petition is filed challenging the order passed by the 1st respondent dated 26.11.2002 by the respondent declining to waive the interest accrued on the amount determined by the Settlement Commission. The facts leading to the impugned order are as follows :

A search operation was conducted at the residential premises of the petitioner under Section 132 of the Income Tax Act on 4.9.1994. On the basis of the material obtained during the course of search, the 2nd respondent issued notice under Section 148 of the Act requiring the petitioner to file income tax returns for the assessment years 1990-91 to 1995-96. For the first of the two assessment years mentioned above, it appears the petitioner had already filed his Income Tax returns on

1.2.1993 and on 23.2.1993. However, in view of the search, he filed revised returns for the above mentioned two assessment years under Section 148 and also filed returns for the remaining assessment years mentioned above.

Thereafter, the petitioner made an application under Section 245-C of the Income Tax Act before the Settlement Commission. Eventually, the Settlement Commission passed an order on 2.12.1999. Though through the application the petitioner, sought the settlement of the issue for the above mentioned assessment years, it appears that the Settlement Commission also went into the question of income of the assessee for the assessment year 1988-89 and came to the conclusion that the petitioner is liable to be assessed on an income of Rs.1,68,09,306/- as against the income admitted by the petitioner of Rs.54,82,805/-. A consequential order under Section 245-D(4) came to be passed by the 2nd respondent demanding payment of Rs.1,57,77,651/- towards the tax on the above mentioned income determined by the Settlement Commission. The demand notice dated 11.2.2000 also stipulated that the above mentioned tax was payable on or before 12.4.2000. It appears that the petitioner paid various amounts before 12.4.2000. The entire amount was not paid by that date. It appears from the pleading that by 8.3.2002, the petitioner paid a total amount of Rs.1,60,66,947/-. As a matter of fact, it appears only part of the amount was paid in cash and the remaining was realized by the department from out of the assets of the petitioner, the details of which will be discussed later in this judgment. In view of the non compliance with the directions of the Settlement Commission regarding the date of payment of the tax determined by it, the Assessing Officer levied interest under section 220(2) of the Act for the

assessment year 1990-91, 1991-92, 1992-93 and 1995-96 by his order dated 8.3.2002. The amount of interest levied was Rs.31,41,106/-. Subsequently, on an application by the petitioner, the Assessing Officer (2nd respondent) rectified the 8.3.2002 order and determined the interest payable at Rs.24,36,352/-. Aggrieved by the levy of the above mentioned interest, the petitioner filed an application before the 1st respondent for waiver of the said interest which application was rejected by the 1st respondent and hence the present writ petition.

Under Section 220(1) of the Act, the amounts specified therein are required to be paid within thirty days of the service of the notice of demand. Under sub-section (2), it is stipulated that if the amount is not paid within the said period of 30 days, the assessee is liable to pay interest, the further details of which may not be necessary for the purpose of this case. However, under section (2A), the 1st respondent herein is authorized to reduce or waive the amount of interest paid or payable by an assessee. Under sub-section (2) if the 1st respondent is satisfied that

(i) payment of such amount has caused or would cause genuine hardship to the assessee;

(ii) default in the payment of the amount on which interest has been paid or was payable under the said sub-section was due to circumstances beyond the control of the assessee; and

(iii) the assessee has cooperated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him.

It is the admitted case of the petitioner that the satisfaction of the 1st respondent regarding the fulfillment of the

three conditions extracted above is cumulative, but not mutually exclusive. However, it is the case of the petitioner that the petitioner's case satisfies all the above mentioned three conditions specified under sub-section (2A) to enable the Commissioner (1st respondent) to waive the interest and it's the submission of the learned counsel for the petitioner that on the fulfillment of the three conditions specified under Section 2A, the Commissioner is bound to grant a waiver, but cannot refuse to waive. Sri N.R.Sivaswamy, learned counsel for the petitioner pointed out that the Settlement Commission recorded a categoric finding at para (9) of its order that the petitioner had cooperated in the proceedings before the Settlement Commission with the following words :

> "9. Considering the co-operation extended by the applicant in the completion of the present settlement proceeding and the true and full disclosure made, we grant immunity under section 245H(1) from the imposition of penalty and prosecution under the Income Tax Act and relevant sections of IPC, relating to matters covered in the present order. However, the immunity so granted shall be withdrawn, if it is subsequently found that the conditions prescribed in sub-sections 1(A) (2) of Section 245H are satisfied."

Insofar as the 1st condition is concerned, the learned counsel for the petitioner submitted that in the application before the 1st respondent, the petitioner stated that he did not own any moveable or immoveable property by the date of the said application. But the 1st respondent recorded a finding at para 9 of the impugned order that "it is learnt that in addition to the property sold, the HUF owns another property;

i.e., about 6000 sq. yards of vacant land located in prime area near Airport, in Begumpet, Hyderabad." Obviously, the reference was to the HUF of which the petitioner is a Member. The learned counsel for the petitioner argued that in the application for waiver of interest, the petitioner made a declaration on 1st November, 2002 before the 2nd respondent to the effect that the petitioner did not own any moveable or immoveable properties and the house referred to by the 1st respondent belongs to his son in whose favour there was a partial partition which partition the above referred house fell to the share of the son which fact was borne out from the Proceedings of the Income Tax Officer, A Ward, Circle-III, Hyderabad. Therefore, the learned counsel argued that the finding of the 1st respondent, the HUF of which the petitioner is a member owns another house is based on no evidence on record.

On the other hand, the learned counsel for the respondent submitted that the petitioner sold another house owned by him in the month of September, 1998 for an amount of Rs.65 lakhs and invested the proceedings of the sale to the Unit Trust of India which would mature after a lapse of five years from the date of the purchase of the units. The learned counsel argued that the sale of the said house itself was subsequent to the search though before the determination of the liability of the petitioner by the Settlement Commission. The petitioner cannot claim that he did not possess any moveable or immoveable assets. The petitioner does not dispute the above mentioned transaction of sale and invested in the Unit Trust of India. But, it's the case of the petitioner that the respondents issued garnishee proceedings against the Unit Trust of India and the Unit Trust of India in a haste sold the units prematurely

thereby resulting in a loss to the petitioner which decision of the Unit Trust of India was challenged by the petitioner in W.P.No.23025 of 2002. A Division Bench of this Court by its order dated 27.8.2004 in resorting to distress sale of the petitioner's unit was illegal and quashed, the operative portion of the said order reads as follows :

> "In the result, the transfer of units of the petitioner to UTI by the 3rd respondent is quashed. Since the tax has already been paid, therefore in the interest of justice, we direct the 3rd respondent to calculate the face value of the units of the petitioner at Rs.10/- per unit and pay the difference to the petitioner. The writ petition is accordingly disposed of. No costs."

The learned counsel for the respondents, however, argued in this behalf that that the respondents are duly authorized by law to initiate garnishee proceedings against the UTI for the units held by them and owned by the petitioner herein. The illegality if any is in the sale conducted by the Unit Trust of India, is an illegality committed by the Unit Trust but not the respondents and therefore the said fact is irrelevant in considering the application of the petitioner for waiver of interest.

We accept the submission of the learned counsel for the petitioner insofar as the property located at Begumpet is concerned and hold that the finding recorded by the 1st respondent is without any material on record. But the question still remains whether such a conclusion vitiates the finding of the 1st respondent that the payment of the interest would cause genuine hardship to the assessee.

The hardship claimed by the petitioner is on account of lack of resources either moveable or immoveable. Even after the conclusion of this Court that the finding of the 1st respondent regarding the property at Begumpet is justified, the fact remains that the petitioner had assets by way of units in the Unit Trust of India by the date of the Settlement Commission determined his liability of tax. The fact that a distress sale conducted by the Unit Trust fetched a lower rate in our view does not make any difference for the consideration of the application of the petitioner for the waiver of interest. The UTI did not follow according to the Division Bench of this Court the requisite procedure in resorting to distress sale. That is a different matter. But, nothing prevented the petitioner from encashing the said units and pay the tax liability in time. The submission of the learned counsel for the petitioner that such a premature sale of the units would result in a financial loss to the petitioner is irrelevant in the context of the application for waiver of interest. If the petitioner is already found liable and due to pay tax under the Income Tax Act, the petitioner cannot choose the time for encashing the assets he had to get the post price for the asset and still complain that the levy of interest would cause undue hardship to him. Apart from that by virtue of the Division Bench judgment of this Court, the UTI is already directed to make good the loss suffered by the petitioner by virtue of the distress sale undertaken by the UTI.

Coming to the satisfaction of the 2nd condition mentioned under Section 220(2A), we are of the opinion that though elaborate submissions are made as to how the said condition is satisfied, we do not propose to examine such submissions in view of the finding reached by us that the petitioner could not establish that the payment of interest would

cause genuine hardship to the petitioner. Admittedly as indicated earlier in this judgment, the three conditions specified in Section 220(2A) are not mutually exclusive, but satisfaction of all the conditions is a *sine qua non* for the exercise of the discretion by the 1st respondent to either waive or reduce the amount of interest.

In the circumstances, we do not see any merit in the writ petition and the same is therefore dismissed.

J.CHELAMESWAR,J

knk
Dt : 27.7.2006

D.APPA RAO,J